Supreme Court, U.S.
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No. 95-938

In The

Supreme Court of the United States

October Term, 1995

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

YUEH-SHAIO YANG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a denial of a waiver of deportation impermissibly relied upon facts that were part of the initial ground of deportation which is sought to be waived.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Alquisalas v. INS, 61 F.3d 722 (9th Cir. 1995)	4, 5
Braun v. INS, 992 F.2d 1016 (9th Cir. 1993)	3, 4, 5
Casem v. INS, 8 F.3d 700 (9th Cir. 1993)	3, 4, 5
Delmundo v. INS, 43 F.3d 436 (9th Cir. 1994)	3, 4
Liwanag v. INS, 872 F.2d 685, *reh'g denied*, 878 F.2d 1435 (5th Cir. 1989)	5
Matter of Alonzo, 17 I. & N. Dec. 292 (1979)	5
Matter of Da Dilva, 17 I. & N. Dec. 288 (1979)	5

Contents

	Page
Statutes Cited:	
8 U.S.C. § 1182(i)	4
8 U.S.C. § 1251(a)(1)(H)	1, 4

STATEMENT OF THE CASE

The Respondent, Mr. Yueh-Shaio Yang, immigrated to the United States in 1982, based upon the petition of his wife, Mary Wong, who claimed to be a United States citizen by birth at San Francisco, California on January 4, 1931. (*See* Appendix A to the Petition for Writ of Certiorari, hereinafter, "Pet. App.", at 6a, 16a, 23a). Mr. Yang subsequently applied for naturalization. On his application he answered a question regarding his marital status by stating that his wife's name was Mary and that she was born in San Francisco in 1931. Pet. App. at 23a. When it was discovered that his wife was not a citizen, the Immigration and Naturalization Service instituted deportation proceedings against Mr. Yang charging that he had procured his immigration by fraud. Mr. Yang admitted the allegation and applied for a waiver of deportation under § 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(H), based upon family unity principles. The immigration judge denied the application in the exercise of his discretion. The Board of Immigration Appeals upheld the denial. The Ninth Circuit Court of Appeals reversed holding that the agency had improperly relied upon facts which were part of the initial entry fraud which was being waived.

Mr. Yang is a 73 year old national of the Republic of China on Taiwan. He and his wife, who is a also a Chinese national, were first married in China. They divorced in 1977. She then came to the United States on a visitor's visa, assumed the identity of Mary Wong, obtained a California birth certificate and United States passport. She then returned to Taiwan and remarried her husband using her new identity. She petitioned for Mr. Yang's immigration which was approved. Pet. App. at 6a-7a. Subsequently, Mr. Yang applied for naturalization. On the application for naturalization is a question regarding name, date and place of birth of spouse. Mr. Yang continued the deception

from his initial entry by listing the same information that his wife used to immigrate him in the first place. Pet. App. at 7a. Although Mr. Yang wrote that the first name of his wife was Mary, the record is not clear whether she routinely used the American name of Mary. What is clear and undisputed is that she was not born in San Francisco in 1931. The Immigration and Naturalization Service contends that it is proper for the immigration judge and the Board of Immigration Appeals to consider the naturalization application in balancing the equities as to whether or not to grant the deportation waiver.

The parties are in agreement that the case law is clear that the initial fraud should not be evaluated in considering the waiver of that fraud. The issue is whether the misrepresentations in the application for naturalization are part of and merely an extension of the initial entry fraud such that they may not be considered.

The opinion of the court of appeals concisely sets forth the two areas that the Board of Immigration Appeals (hereinafter, "BIA") impermissibly considered in deciding the waiver. The court found that the naturalization application was merely an extension of the initial fraud and therefore could not be held against Mr. Yang. In addition to the naturalization application, the BIA also considered Mr. Yang's participation in divorcing and then remarrying his wife. The court of appeals properly ruled that the act of divorcing and remarrying were inextricably tied into securing his own entry into the United States and therefore should not be considered. In order to immigrate, Mr. Yang needed to "marry" his wife a second time under her new United States identity. However, all his other records showed that he was already married. He had to divorce Mrs. Yang in order to be free to marry "Mary". But for the divorce, Mr. Yang could not have benefited from his wife's newly acquired United States passport. Clearly, the divorce and remarriage are inextricably intertwined with Mr. Yang's coming to this country. (Mr. Yang

and "Mary" subsequently divorced, but no immigration benefits flowed from the second divorce).

The INS argues in this petition that the opinion below is one in a series of five decisions where the court of appeals has erroneously substituted its own discretion for that of the BIA. In the first of the series, *Braun v. INS*, 992 F.2d 1016 (9th Cir. 1993), the alien immigrated based upon a marriage to a U.S. citizen. Braun subsequently divorced the citizen wife, and married a second time to a foreign national. When he applied for naturalization, it was discovered that his "second" wife was in fact a wife from an even earlier, undissolved marriage which predated his marriage to the citizen wife. The INS in that case contended that Braun had engaged in an "elaborate plan" to bring his original wife to the United States. The court of appeal noted that the record did not contain any evidence to substantiate that contention. The record did not reflect that Braun filed any immigration petition on behalf of the original wife. In the second case, *Casem v. INS*, 8 F.3d 700 (9th Cir. 1993), the alien immigrated as the unmarried daughter of a permanent resident. After immigrating, she returned to the home country, married and filed an immigration petition for her husband. During the adjudication of that immigration petition, it was discovered that she had been married to him prior to her own immigration and had concealed that marriage to maintain eligibility to immigrate as an unmarried daughter. When confronted with the true facts she withdrew the petition for her husband. The court of appeal held that the waiver of deportation should have been granted upon a consideration of all the relevant factors. In the fourth case, *Delmundo v. INS*, 43 F.3d 436 (9th Cir. 1994), the alien entered the United States as a nonimmigrant visitor using a false identity. She married a United States citizen under this assumed identity and basically lived a new life under the assumed name—obtaining a driver's license, social security card, and voter's identification card. When she applied for naturalization, she

continued to identify herself under the assumed name. She was discovered and deportation proceedings were commenced. She applied for a new grant of permanent residence based upon her marriage to a United States citizen and applied for a waiver of the initial fraud under § 212(i), 8 U.S.C. § 1182(i) which is the initial immigration application waiver analogous to the deportation waiver of § 241(a)(1)(H) in this case. The court held that the waiver should have been granted because her actions in obtaining the identification documents were to maintain and continue her new identity and were not separate and distinct acts of fraud.

The fourth case is the instant case in the petition pending before the Court. In the fifth case, *Alquisalas v. INS*, 61 F.3d 722 (9th Cir. 1995), the alien also entered as the unmarried child of a permanent resident. In fact, Alquisalas had married prior to immigrating. A year after immigrating, he returned to the home country and married his wife a second time. As the opinion notes, the administrative record did not show that Alquisalas tried to petition for his wife to come to the United States and that she was still residing overseas when the deportation proceedings commenced. Nevertheless, the INS contended that Alquisalas' remarriage to his original wife constituted an adverse factor to allow the wife to immigrate to the United States. The court of appeals held that the remarriage, without more, cannot be considered to be fraud. In the *Braun*, *Delmundo*, and *Alquisalas* cases, no further immigration benefits to any other persons were derived from the initial fraudulent entry. Only in the *Casem* case did the alien attempt to use her fraudulent immigration to petition for another person. In the petition before the Court, there is no evidence in the administrative record to show that Mr. Yang tried to use his immigration status to petition for anyone else's permanent residence. In the *Braun* and *Alquisalas* cases, one could conceivably argue that the remarriages were in preparation for some future immigration petition to the spouse. In this case, Mr. Yang did not apply for anyone else and would have no reason

to do so. As the decision of the immigration judge notes, after Mr. Yang's wife obtained her United States passport, she petitioned for Mr. Yang and their children. The evidence does not show that he tried to petition for them. Pet. App. at 7a. And, after his wife's assumed identity was exposed, their United States citizen daughter petitioned for the mother's immigration legitimately. Pet. App. at 7a -8a.

The INS cites *Liwanag v. INS*, 872 F.2d 685, *reh'g denied*, 878 F.2d 1435 (5th Cir. 1989), as the proper decision to follow. However, that case is clearly distinguishable from Mr. Yang's situation. In the *Liwanag* case, as in the *Casem* case, the alien remarried his wife and filed an immigration petition on her behalf.

Mr. Yang's continued assertions on his naturalization application that his wife was born at San Francisco is nothing more than a part of a single scheme to continue to maintain his wife's assumed identity. The court's opinion below is consistent with the INS' own decisions of many years not to consider acts which are a part of the initial fraud. *See Matter of Alonzo*, 17 I. & N. Dec. 292 (1979); *Matter of Da Silva*, 17 I. & N. Dec. 288 (1979).

There are no compelling reasons to grant this petition for a writ of certiorari. Whatever immigration benefits aliens such as those in *Braun* and *Alquisalas* may confer on their respective spouses is speculative and irrelevant to Mr. Yang's case. It would be unfair and impose a serious practical burden on Mr. Yang to require him to defend a line of cases which is clearly distinguishable from the decision in his case.

CONCLUSION

The opinion of the Court of Appeals is correct and this Court should deny the writ for the reasons as stated above.

Respectfully submitted,

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